

About new opportunities of using results of criminal investigation activity within the territory of the Eurasian Economic Union: Russia, Kazakhstan and Belorussia

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Abstract. In May, 2014, a treaty establishing the Eurasian Economic Union upon the basis of the existing Customs Union including Russia, Kazakhstan and Belorussia, was signed. Thus, this article studies the legal status of criminal investigation results in criminal legal proceedings in the framework of the Customs Union. Law scholars' viewpoints and standpoints concerning including the criminal investigation results in the criminal legal proceedings are analyzed, since during developing and accepting the treaty establishing the Eurasian Police these issues become of present interest. Basing on legal analysis the author has worked out his own stand and made specific offers. Besides, relying on the above stated and with regard to the practice of the European Union, conclusions are made concerning new opportunities of using the criminal investigation results within the territory of the European Economic Union.

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Introduction

On April, 09, 2014 the President of the Republic of Kazakhstan carried Decree No. 278, "A Unified State Plan: Shift to a new model of Criminal Law and Criminal Legal Proceedings, Improved Administrative Offences Legislation and a System of Criminal Sanctions Execution" [1].

Among the measures taken there is study of laws and regulations governing arrangement and tactics of criminal investigative actions with due regard to introduction of non-public investigative actions institution [2: 3].

Besides, the new model of criminal legal proceedings has been developed with regard to precedents available within the legal norms of foreign legislation. One of its main ideas is to try to combine the two functions of the legal proceedings: criminal investigation and criminal trial. This is quite naturally since Kazakhstan legal approaches and problems have much to do with countries with continental legal traditions.

However, in May, 2014, a treaty establishing the Eurasian Economic Union was signed. It is based upon the existing Customs Union including Russia, Kazakhstan and Belorussia and represents one of the forms of world integration aiming at liberalization of foreign economic relations within the Union and effecting outside collective protectionism. One of the main system-forming factors is cooperation in the fields of security, crime prevention, maintaining and strengthening international security and stability and

prevention of new challenges and hazards which is the most popular areas of interaction [3].

Procedure

According to Kozlovsky, A.Y., taking into account that the countries included in the Customs Union have a common customs territory, effectiveness of the criminal investigation activity of customs authorities aimed at preventing crimes in the sphere of customs affairs can easily be enhanced. To this end it is efficient to improve the existing and conclude fundamentally new agreements aimed at solving problems not only of criminal investigative (first of all, related to creation of strategic positions within the territory of the countries included in the Customs Union), but also of legal and criminal trial nature (first of all, related with prevention of criminal acts, gathering and practical use of gathered procedural evidence) [4: 106].

To our opinion, aside from customs authorities these measures should be taken with regard to all law enforcement authorities. At this, effectiveness of crime preventing in the framework of the Customs Union can still be enhanced in case if laws and regulations, including criminal procedure legislation, of the member countries will be balanced by the extent and the implication.

The essential part

It should be noted that in the Republic of Kazakhstan, as well as in the Russian Federation and

the Republic of Belarus the process of creation the institution of criminal investigation goes back to the post-Soviet period. But use of the criminal investigation results in criminal trial started to be regulated by the Law “About Criminal Investigation Activity”, when this law was adopted in Russia in August, 12, 1995, in the Republic of Belarus in July, 09, 1999, in the Republic of Kazakhstan in September, 15, 1994.

This law has fixed a system of legal guarantees of carrying out criminal investigation as well as a functional purpose of criminal investigation materials.

Besides, according to the Criminal Procedure Code of the Russian Federation the materials resulting from the criminal investigation may become the basis for material evidences. According to article 89 of the Criminal Procedure Code of the Russian Federation, the criminal investigation results are prohibited to be used in proving if they are not in compliance with requirements imposed to evidence by criminal procedure laws [5].

According to article 101 of the Criminal Procedure Code of the Republic of Belarus materials gathered in the course of criminal investigation can be acknowledged as a source of evidence if they have been received in compliance with the law about criminal procedure activity and checked according to the requirements of the Criminal Procedure Code [6].

The current Criminal Procedure Code of the Republic of Kazakhstan forced into application since January, 1, 1998, implies the possibility of using criminal investigation results as criminal evidences. Article 130 of the Criminal Procedure Code of the Republic of Kazakhstan says that “results of criminal investigation received in compliance with the law can be used in proving during criminal trial according to the provisions of this Code governing gathering, studying and assessing evidences” [7].

Currently in Kazakhstan the criminal legal proceeding and the whole system undergo significant modifications. According to a new Criminal Procedure Code of the Republic of Kazakhstan it is supposed to introduce such sections of criminal investigation as non-public investigative actions (Chapter 30). This simplifies the requirement for using criminal investigation results in criminal legal proceeding and acknowledging these evidences to be infallible.

However, legislative authorities of the Russian Federation and the Republic of Belarus are in no hurry to make some drastic modifications in the criminal procedure legislation such as introduction of non-public investigative actions as a way of gathering evidentiary information.

Until the present time Russian law scholars have no common opinion concerning inclusion of the results of criminal investigation in a criminal trial, but for many years a problem of studying it has aroused heightened interest and there is a variety of standpoints upon this issue.

So, for instance, as early as in 1993 Dolya, E.A., said about inclusion of the results of criminal investigation in a criminal trial the following “results of criminal investigation can never be considered and used as criminal evidences even if they are verified in accordance with the criminal procedure legislation” [8: 7].

Bednyakov, D.I., expresses the contrary opinion and underlines that “procedural activity will be impossible without using non-procedural methods, while non-procedural activity is aimless without further using of its results” [9: 80].

Petrukhin, I.L., considers that “criminal investigation data should be excluded of a system of evidences due to the impossibility to comply with legally stipulated necessary procedural guarantees when gathering them” [10: 80].

With regard to this aspect Bozrov, V.M., says the following: “it seems to be no need to set forth consistent arguments verifying conservatism of such a standpoint, since the very comparison between the period of repressions and the modern Russian democracy-oriented statehood is at least deprived of ethics. Besides, a procedure of criminal investigation carried out directly by an investigating authority is mainly the same as that of uniform investigatory actions. They differ only in the form. At this a authenticity of criminal investigation results is not guaranteed by a way they have been received but by their verifiability, including with regard to their lawfulness. As for possible falsifications and misuses, no investigatory actions are secured against them. The purpose consists in minimization of these phenomena by means of a system of criminal and criminally procedural guarantees” [11: 24].

Analyzing this problem, Popov, A.P., considers that “an existing traditional prejudice about criminal investigation as a the necessary evil, the barbaric intrusion into a personal life can’t be denied. This prejudice exists not only in legal consciousness of common people, but also in minds of law scholars” [12: 410].

In his works Mazunin, Y.M., also specifies that “even the most democratic and prosperous state can’t do without special organizations, whatever they are named, preventing and fighting with crime. At this over centuries secret activity which is now called criminal investigation has been hidden, thus bringing forth guesses, tales, half-words and gaps existing until nowadays and arousing distrust and fear. This is

proved by a biased attitude to the results of criminal investigation which still exists in the procedural science and is represented by distrust to these results as being received through possible breach of law” [13: 30].

In order to stop further controversy over use of the results of criminal investigation in proving, Baranov A.M. suggests that the non-public methods of gathering evidences should be included into the Criminal Procedure Code and given the status of procedural actions [14: 28-35].

With this regard a viewpoint of Shakhirin, A.E., is of the certain interest. He offers to take into account a foreign practice and legally disclose the contents of certain investigative actions in the Criminal Procedure Code of the Russian Federation, thus permitting to consider arrangement and tactic of this activity as a part of preliminary investigation in a covert form. As a result information received in the course of criminal investigation will be concerned as secrecy of investigation [15: 26].

Bozrov, V.M., says about it: “The actual criminal situation requires development of possibilities of the current legislation in order to resolve it. This should not be the case of active use of the criminal investigation results in criminal proving since investigative data is all about actual information concerning facts to be proven. There is nothing to do but to modify articles 74 and 140 of the Criminal Procedure Code of the Russian Federation. The very definition of evidences specified in Section 1 of Article 74 of the Criminal Procedure Code of the Russian Federation recommends this suggestion. This means that as far as a mechanism of its generation is concerned, information received in the course of criminal investigation differs only in a procedural form which should be brought into the required compliance” [11: 25].

Also, Russian law scholars consider that the legislation and progress of the legal science create necessary and sufficient opportunities for development of new procedural forms which will comply with the requirements of legality and propriety in the course of special non-public investigatory actions [12: 408].

In the Republic of Belarus this problem was studied by Galeznik, M.V., Guchok, A.E., Tkalov, A.N., and others. In most of the cases the problems of using the criminal investigation results in proving are not given much attention, they are just identified without issuing certain suggestions and ways of their resolving.

However, Belarusian law scholars have different standpoints concerning this issue.

For instance, Sviridenko, A.Y., considers that “nowadays there is an acute need for improving a

procedure of including the criminal investigation results, i.e. information received through criminal investigative measures, into criminal proceeding. This procedure should be perfected and simplified, since wholesale and unjustified use of criminal investigation results in the course of criminal legal proceeding causes that these evidences are acknowledged to be unlawful. And their use results in acquittals” [16: 154].

Klimov, D.A., thinks that “non-procedural forms do not imply any reliable guarantees of authenticity, that’s why information received from such sources is considered to be preliminary and guiding ones” [17: 124].

Voitikhovich, S.A., also notes that “a problem of converting information received in the course of criminal investigation through non-public actions into procedural evidences is one of the most acute ones, since it is not studied, and both efficiency of investigatory work and protection of citizens’ legitimate rights depend on its resolution” [18: 101].

Practice of the European Union plays a great role in the further development of the Eurasian Economic Union. The process of integration in the framework of the European Union implies particularly internationalization of criminal activity without internal territorial boundaries. Member countries of the European Union have worked out a dedicated system of actions and solutions taken by the whole European Union [19: 30].

In this regard it can be noted that the legislation governing criminal legal proceeding, in particular concerning criminal investigation in the framework of investigatory actions, is similar to that of such countries as the Federal Republic of Germany, the French Republic, the Italian Republic, the Swiss Confederation and the Kingdom of Belgium, where non-public information is used in proving.

Criminal Procedure Codes of European countries have special sections governing a procedure of non-public investigatory actions (in our country referred to as criminal investigation).

For instance, in the Federal Republic of Germany in case of suspicions in certain grave offences paragraphs § 100c and § 110a of the Criminal Procedure Code of the Federal Republic of Germany not only imply monitoring of telephone conversations, but also secret monitoring of all conversations carried on in some dwelling room [20].

Articles 100-100-7 “About wiretapping of messages transmitted by means of telecommunication facilities” of the Criminal Procedure Code of the French Republic are devoted to investigatory actions [21].

The Criminal Procedure Code of the Italian Republic recognizes use of testimony born by criminal policy officers, in court. This means that the received secret data are included into a matter under investigation as judicial evidences [22].

Article 269 of the Criminal Procedure Code of the Swiss Confederation also allows bugging if there are the gravest crimes in question. The use of bugging should be justified with regard to the degree of a certain crime and if it is impossible to obtain evidences through another more conventional way [23].

Section “Special Investigative Methods” of the Criminal Procedure Code of the Kingdom of Belgium describes three methods in sufficient details: penetration, investigative monitoring and work with confidants [24].

Conclusion

Finally it can be notes that creation of a procedural legal system uniting activity of institutions of member countries of the Eurasian Economic Union and establishment of a special authority in charge of coordination of criminal investigative actions of law enforcement agencies and arrangement of confidential information exchange, will keep the balance between the principle of independence and national sovereignty in the framework of integration and involvement of all new spheres of social relations into integrative cooperation.

Resume

Thus, the following conclusions can be reached.

In our opinion, for member countries of the Eurasian Economic Union (Russia, Kazakhstan and Belorussia) it is reasonable to make a joint decision concerning united criminal legal proceeding and practical use of criminal investigation materials in proving.

Since a code-based branch of law is a whole and consistent entity (a statutory act), interference in this system requires correction of the rest component elements. Even through the example of a term “non-public” investigatory actions. This may cause certain complications concerned with joint criminal investigation actions within the territory of the Customs Union (the Eurasian Economic Union).

As Popov, A.P., notes, inadequate modifications can inflict harm. He suggests that all ideas and standards should be studied and taken into account in improving the current and developing the new Criminal Procedure Code of the Russian Federation [12: 408].

Besides, upgrading legal and law enforcement systems referred to in the Address of the President of the Republic of Kazakhstan dated January, 2012, also includes creation of the Eurasian Police (EurasPol) which could “escalate the war on transnational organized crime in the Common free market zone” [25].

In this regard the above stated problems become topical and make it necessary not only to exchange information between police services of the three member countries of the Eurasian Economic Union, but also to render support in criminal investigation of criminal cases conducted by investigative authorities of the member countries.

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